

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
A National Broadband Plan for Our)	GN Docket No. 09-51
Future)	
)	WC Docket No. 07-135
Establishing Just and Reasonable Rates for)	
Local Exchange Carriers)	
)	WC Docket No. 05-337
High-Cost Universal Service Support)	
)	CC Docket No. 01-92
Developing an Unified Intercarrier)	
Compensation Regime)	
)	CC Docket No. 96-45
Federal-State Joint Board on Universal)	
Service)	WC Docket No. 03-109
)	
Lifeline and Link-Up)	WT Docket No. 10-208
Universal Service Reform – Mobility Fund		

FURTHER NOTICE OF PROPOSED RULEMAKING

Comments of the National Tribal Telecommunications Association

I. Introduction

The Wireline Competition Bureau seeks comments on the Order to Reform the Universal Service Fund High Cost Loop Support.

The National Tribal Telecommunications Association is comprised of the 12 Indian Tribes that have created their own telecommunications service (Cheyenne River Sioux, Tohono O’odham, Gila River, San Carlos Apache, Fort Mojave, Salt River Pima Maricopa, Mescalero Apache, Hopi, Standing Rock Sioux, Warm Springs, Crow Creek Sioux, and Pine Ridge Sioux tribal nations.)

Because Tribal communities have high unemployment, high poverty, and large numbers of low-income customers, 86 percent of Gila River’s subscribers are Low-Income Program customers, 72 percent of Hopi’s subscribers are Low-Income Program customers; and 60 percent of San Carlos Apache’s subscribers are Low-Income Program customers, NTTA is particularly vigilant over regulatory changes that impact Tribal customers and the ability of Tribal providers to be able to sustain regulatory services to their communities.

Policy rules that impact Tribal communities or affect the ability of Tribal providers to sustain services to their communities should be weighed with an eye toward effecting the least harmful impact on tribal subscribers and providers.

The Commission asks in this FNPRM a series of questions on how to meet the obligations of universal service to Tribal communities within the confines of the USF and ICC reform Order.

In the answers and discussion below, NTTA urges the FCC to take all necessary regulatory and policy measures to bring parity of broadband technology and service to Native communities as a requirement of universal service mandate of the Communications Act and of the Commission's Federal Trust responsibilities—regardless of the framework of FNRPM questions asked.

II. Executive Summary

- The FCC has an opportunity to solve the historic underservice to Native communities through a series of strategic and unique policies.
- By giving a sovereign nation the choice of its ETC provider, the Commission honors its special trust relationship to Tribal sovereign nations.
- By supporting the decision of Tribal governments to form their own regulatory service, the Commission promotes self-sufficiency of Tribes to solve their own telecommunications needs.
- By promoting ETC “engagement” with Tribes, the FCC promotes quality of service consultation that protects the

public interest of Tribal consumers and alters the legacy of leaving service outcomes to chance on Tribal lands.

- preserving the incumbent level of support and reducing the level of harm to Tribal telecos, preserves the public interest obligations of Tribal governments to its own previously unserved communities.
- The Commission must minimize the uncertainty of service providers and quality of service on Tribal lands from competitive bidding in price cap “unserved areas” —by giving Tribes the option to serve themselves
- The FCC must ensure that mobility fund dispersals for Tribal lands benefit tribes with the greatest need and whenever possible permit Tribes to become their own providers.

III. Comments: The Federal Communications Commission must finally meet the mandate to provide Universal Service to Tribal Nations.

A. Native Sovereignty and Telecommunications: A Recognition of the Uniqueness of Tribal communities and the Need to apply Unique solutions

Native peoples reside in the worst connected communities in America for both broadband and for basic voice dial-tone. Native communities almost uniformly lack wireless mobility broadband service except in higher density areas.¹

As Eligible Telecommunications Carriers (“ETCs”) and former unserved communities, the National Tribal Telecommunications Association (NTTA) tribes understand the economic pressures building on the Universal Service Fund (USF) and applaud the Commission’s efforts to evolve public telecommunication networks to Broadband capacity, while improving efficiencies within the new Connect America Fund (CAF).

The Federal Communications Commission has acknowledged the need to connect Native communities through the National Broadband Plan.² In the National Broadband Plan the FCC stated:

“Tribes need substantially greater financial support than is presently available to them, and accelerating Tribal broadband will require increased funding.”³

¹ Data is sparse on wireless connectivity in Native communities but every Native resident can point to the boundaries of wireless service cell reach in their community.

² See Federal Communications Commission, *Connecting America: The National Broadband Plan*, at 152, (rel. Mar. 16, 2010) (*National Broadband Plan*).

³ *Id.*

However, as the National Tribal Telecommunications Association pointed out in its April 17, 2008 comments on the FCC proposed High Cost Universal Service Support NPRM, WC Docket No. 05-337:

“While thirty percent of the residents of tribal lands wait for simple dial tone, the Commission is preparing to provide broadband and mobile services to those who already enjoy universal service. The current situation is unacceptable and the Commission must take all necessary steps to ensure that the promise of universal service is finally achieved in all areas of the country.”

The Commission needs to honor both its Communications Act and its trust responsibility to provide parity of technology and service to Native communities.

The Commission has acknowledged its special responsibility to Native tribes.⁴ In the Commission’s First Order on Rural Radio Service providing a Tribal priority for licensing⁵, the Commission said:

“Tribes have an obligation to ‘maintain peace and good order, improve their condition, establish school systems, and aid their people in their efforts to acquire the arts of civilized life,’ within their jurisdictions,⁶ and that the Commission has a longstanding policy of promoting tribal self-sufficiency and economic development, as well as providing adequate access to communications services to Tribes.”⁷

⁴ *Rural NPRM*, 24 FCC Rcd at 5247-49.

⁵ 47 U.S.C. § 307(b) (“Section 307(b)”).

⁶ S.Rep. No. 698, 45th Cong., 3d Sess. 1-2 (1879) (quoted in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140, 102 S.Ct. 894, 903, 71 L.Ed.2d 21 (1981)).

⁷ *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, 16 FCC Rcd 4078, 4080-81 (2000) (“*Tribal Policy Statement*”).

B. Specific Measures to Honor and Promote Sovereignty will Alter Underservice on Tribal Lands

In previous FCC comments, NTTA has asked the FCC to implement a second variety of “commercial consultation” to help Tribal communities to participate in the deployment of regulatory service and to negotiate and monitor the quality of regulatory service provided to the Tribal Nation. ETCs should always adhere to the legal requirements of attaining rights-of-way and adhere to local tribal requirements for doing business in the community.

With this Order, the FCC has laid the foundation for ETC “engagement” with Tribes and sets the stage for defining additional “engagement”, public interest requirements, and official notifications on Tribal lands with Tribal governments. (“where appropriate” within the Order needs to be defined and detailed further). Several additional sovereignty mechanisms must be adopted if service outcomes and parity of technology are to be realized on Tribal lands.

First, the requirement of the FCC’s Trust policy to consult with Tribes on policies with “material” impact on Tribes has not been implemented in a clear or comprehensive manner. The creation of Office of Native Affairs and Policy (ONAP) is a vital first step in this direction, but the compelling need to include Tribes for the development of tribal solutions within FCC’s USF and ICC Order

has not been realized. The FCC's rulemakings is an opportunity to bring that to fruition--that some fear may pass Tribal communities by.

Second, NTTA urges the FCC to give Tribes the fundamental choice of deciding which ETCs will provide service to the Tribal community—including itself. This is so elemental as a recognition of sovereignty of Indian Nations that the Federal government cannot impose a regulatory—publicly subsidized—provider on a Tribal community as to ignore the fact the Tribal governments have sovereignty over their own lands, resources and customs. Especially as non-Tribal ETCs have sometimes ignored the legal requirements of Tribal governments and the needs of Tribal consumers. This is not in the FNRPM but must be considered as a practical matter for the future as competitive auctions might bring a host of new providers to Tribal communities without any public interest protections for the Tribal consumers. This basic choice of ETCs would underscore the special relationship government-to-government between the Federal government and Tribal nations. It would promote self-sufficiency of Native governments. The choice option given to Tribes would alter the control over quality of regulatory service on Tribal lands and reverse the historic neglect of quality of service on Tribal lands by the Commission.

The choice of ETCs by a Tribe will also promote the opportunity for Tribes to provide their own regulatory service, a solution that has wrought dramatic results in 8 Tribal communities.

This brings into the policy consideration a third sovereignty principle and mechanism that NTTA advocates: for the FCC to remove barriers from and support the decision of Native governments to become their own regulatory providers. The Standing Rock ETC decision by the FCC is historic in that a Native community could become a CETC and designate its entire community as a single service area. However, there are two detractions to this perceived policy victory by Native governments: first, the designation only gives the Tribe secondary status in their own Native lands as a CETC, not the primary position as ETC. Second, the ability of CETCs to receive USF support is being eliminated under the repeal of the Identical Support Rule and Standing Rock will be receiving two additional years compared to other providers in preparing for the loss of their USF support. The true choice of sovereignty for a Tribal Nation to serve itself as a regulatory provider is in the FCC's backing of the Nation's choice over the objections of both States and non-Tribal ETCs, something that is not addressed in the current or future FNRPMs. (NTTA has witnessed numerous cases where Tribes wanting to buy out the service area of incumbents to become

their own regulatory provider was blocked by the refusal of the incumbent to sell the service area of the tribal territory to the Tribe.)

C. The Unique Status of Sovereign Nations Requires Immediate and Unique Solutions

NTTA asserts that the FCC needs to implement a bottom-line policy of directing unique solutions to Tribal Sovereign Nations based on both the Federal Trust relationship with Indian Nations and the historic under-service to Native communities.

The FCC has for some time understood and documented the conditions of under-service on Tribal lands. In the Sacred Winds Order, the FCC references the 12th Report and Order findings:

“The Commission has recognized that Native American communities have the lowest reported level of telephone subscribership in America.”⁸

The Commission has acknowledged its special responsibility to Native Tribes. In the 12th Report and Order, the FCC said:

“The Commission found the enhancement of tribal communities’ access to telecommunications services consistent with its obligations under the Act to preserve and advance universal service, and its obligations under the historic federal trust relationship between the federal government and federally-recognized Indian tribes to encourage tribal sovereignty and self-governance.”⁹

⁸ See *Federal-State Joint Board on Universal Service, Twelfth Report and Order*, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, para. 5 (2000) (*Twelfth Report and Order*).

⁹ *Id.* at 12222, para. 23, 12222-24, para. 26.

In the Commission's First Order on Rural Radio Service providing a Tribal priority for licensing¹⁰, the Commission said:

"Tribes have an obligation to 'maintain peace and good order, improve their condition, establish school systems, and aid their people in their efforts to acquire the arts of civilized life,' within their jurisdictions,¹¹ and that the Commission has a longstanding policy of promoting tribal self-sufficiency and economic development, as well as providing adequate access to communications services to Tribes.¹²"

In the FNRPM for Tribal solutions for the Mobility Fund the FCC asks if it should take a separate track:

"Because this relationship warrants a tailored approach that takes into consideration the unique characteristics of Tribal lands,¹³ we believe addressing Mobility Fund support for Tribal lands on a separate track will be beneficial in providing adequate time to coordinate with American Indian Tribes and Alaska Native Village governments and seek their input."

In Paragraph 479 of the USF Order, in referencing the Mobility Fund NPRM, the Commission noted:

"...the Commission acknowledged the relatively low level of telecommunications deployment on Tribal lands and the distinct challenges in bringing connectivity to these areas.¹⁴ The Commission observed that greater financial support therefore might be needed in order to ensure the availability of broadband in Tribal lands.¹⁵

¹⁰ 47 U.S.C. § 307(b) ("Section 307(b)").

¹¹ S.Rep. No. 698, 45th Cong., 3d Sess. 1-2 (1879) (quoted in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140, 102 S.Ct. 894, 903, 71 L.Ed.2d 21 (1981)).

¹² *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, 16 FCC Rcd 4078, 4080-81 (2000) ("Tribal Policy Statement").

¹³ *National Broadband Plan* at 146.

¹⁴ *Mobility Fund NPRM*, 25 FCC Rcd at 14,727, para. 33. See *supra* note 197.

¹⁵ *Id.*

The FCC noted the historic underservice on Tribal lands, the challenge of high-cost areas, and the presence of distinct obstacles to the deployment of “broadband infrastructure”. Commission noted even that a greater financial support therefore might be needed in order to ensure the availability of broadband in Tribal lands. The Commission then come to the recognition:

In light of the Commission’s unique government-to-government relationship with Tribes and the distinct challenges in bringing communications services to Tribal lands, the Commission also noted that a more tailored approach regarding Mobility Fund support for Tribal lands might be beneficial.¹⁶

Yet the Commission has not taken the necessary and comprehensive steps necessary to solve the lack of service and parity of technology on Native lands.

D. The FCC Needs to Take Specific Actions to meet the Need of Tribal Communities

Given the FCC’s heightened awareness, NTTA is concerned that the only targeted resources in the USF and ICC Order for Native communities is for 3G and 4G mobility platforms.

While the good has been the setting aside of specific funding to target deployment of mobility broadband to “unserved” Tribal areas, it underscores disturbing flaws in the policy toward Native lands. The Mobility first approach

¹⁶ *Id.*

puts the priority of help for Indian country upside down, emphasizing the use of funding for 3G and 4G hand-held unit mobility networks and ignoring the gaping need to build robust foundational broadband networking (fiber) to the “unserved” broadband communities. Technologically the flaw targets 3G and 4G networking into areas that may not have the underlying capability to support the mobility network without first bringing broadband fiber to support 3G/4G—perhaps this is an implicit leverage to deliver fundamental PSTN or digital public network capacity to help make the 3G and 4G networks viable. Right-side-up thinking would prioritize delivering fiber—with all deliberate speed—to rural communities to support end-user wireless and Internet capability on top of it.

NTTA has proposed the core components for a Native Broadband Fund. They focus on the specific needs for Native communities and highlight the necessary platform and applications support essential to the deployment of broadband in Native communities.

There are four specific platforms that must be supported and expanded on Native lands: the Public (or soon to be Digitally) Switched Telecommunications Network, the Public Safety Network (and beyond infrastructure, direct assistance for E-911 mapping, PSAP reconfiguration and support, and interoperability support); the community mass media network; and a mobility network.

Key supportive activities needing FCC support include: Native Broadband Mapping (controlled by Native communities); a Broadband Lifeline and Linkup support program; and a Tribal anchor institution support program.

The FCC must focus its resources and policies on these essential platforms and support activities to enable broadband deployment to succeed on Native lands. NTTA urges further rule-makings that will address these needs.

E. The FCC Needs to Preserve Tribal Regulatory Services

Paragraph 1059 of the FCC Order asks in the prescription whether a different rate of return is warranted for Tribally-owned and operated carriers.

To the it's credit the Commission acknowledges the unique circumstances of Tribal governments their delegated ETCs playing a vital role in serving the needs and interests of their local communities. The Commission also notes these communities are in low-income and underserved regions of the country.¹⁷

Tribal carriers are unique as ETCs

Tribal Telecommunications carriers are different from other ETCs in many

¹⁷ The Commission cites *Telecommunications Carriers Eligible for Universal Service Support; Standing Rock Telecommunications, Inc. Petition for Designation as an Eligible Telecommunications Carrier; Petition of Standing Rock Telecommunications, Inc. to Redefine Rural Service Areas; Petition for Reconsideration of Standing Rock Telecommunications, Inc.'s Designation as an Eligible Telecommunications Carrier on the Standing Rock Sioux Reservation*, WC Docket No. 09-197, Memorandum Opinion and Order on Reconsideration, 26 FCC Rcd 9160, 9161 (2011) (*Standing Rock Final ETC Designation Order*).

distinguishing ways. They are a fundamental part of an entire community and a service offered by sovereign nations. Tribal ETCs are regulated by the FCC and by a Tribal council. Tribal regulatory companies are not able to use Tribal assets to collateralize their capital needs, but must look to public and private investors and lenders. Tribal telcos must serve the entire Tribal community, from government to private customers, from businesses to indigent members of the community. Tribal ETCs must also support all other infrastructure services (water, power, waste management), as well as public safety needs (including E-911 mapping and PSAP support), and support Internet needs within the community.

In the ETC designation Order released March 17, 2005, the Commission adopted additional requirements for ETC designation proceedings in which the Commission acted pursuant to section 214(e)(6) of the Act.¹⁸ Specifically, consistent with the recommendations of the Federal-State Joint Board on Universal Service, the Commission found that:

¹⁸ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 20 FCC Rcd 6371 (2005) (*ETC Designation Order*); see also *Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier for the Commonwealth of Virginia*, CC Docket No. 96-45, Memorandum Opinion and Order, 19 FCC Rcd 1563, 1564, 1565, 1575-76, 1584-85, paras. 1, 4, 27, 28, 46 (2004) (*Virginia Cellular*); *Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier for the Commonwealth of Virginia*, CC Docket No. 96-45, Memorandum Opinion and Order, 19 FCC Rcd 6422, 6438, paras. 1, 33 (2004) (*Highland Cellular*).

“...an ETC applicant must demonstrate: (1) a commitment and ability to provide services, including providing service to all customers within its proposed service area; (2) how it will remain functional in emergency situations; (3) that it will satisfy consumer protection and service quality standards; (4) that it offers local usage comparable to that offered by the incumbent LEC; and (5) an understanding that it may be required to provide equal access if all other ETCs in the designated service area relinquish their designations pursuant to section 214(e)(4) of the Act.¹⁹ These additional requirements are mandatory for all ETCs designated by the Commission.²⁰ ETCs already designated by the Commission or ETC applicants that submitted applications prior to the effective date of the *ETC Designation Order* are required to make such showings in their annual certification filings.²¹

While Tribal telecos are held to the same obligations as all ETCs, nevertheless Tribal ETCs operating as Tribal services must abide by: 1) a commitment and ability to provide service to all customers within its proposed service area—often regardless of a community member’s ability to pay for service, see Gila River Teleco’s subsidy of tribal elders and the last dollar support for Lifeline customers; 2) the requirement that it must remain functional in emergency situations—not only must the Tribal Teleco support governmental services and anchor institutions, but it must support all public safety services and emergencies—many tribes face 30-75 forest fires annually; and, 3) that it must satisfy consumer protection and service quality standards—Tribal telecos

¹⁹ See *ETC Designation Order*, 20 FCC Rcd at 6380, para. 20, citing *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, 19 FCC Rcd 4259, para. 5 (2004) (*Recommended Decision*).

²⁰ 47 C.F.R. § 54.202(a).

²¹ See *id.*; 47 C.F.R. § 54.202(c).

are answerable to the Tribal government, to their community, and to their own family members for quality of service.

Because of the lack of wherewithal by community members to subscribe to residential broadband service, Tribal telcos are responsible for providing broadband to a wide range of anchor institutions that render essential community service and provide resource information vital to community members. This obligation distinguishes between commercial carriers and Tribal Carriers.

For instance, Tribal telcos are obligated to provide state-of-the-art technology and service to public anchor institutions in their communities, such as Government offices; schools; libraries; public safety offices and emergency services; health clinics; business and economic development offices and entities; community centers; senior centers; Headstart centers; waste and sewage and power authorities; boys and girls clubs; food commodity centers; fire-fighting towers; and a range of federal offices operating on Tribal lands, such as BIA, fish and wildlife, EPA, Homeland Security, and other resource and support authorities on Tribal lands.

Tribal Providers: How Some Communities with Historic Underservice Met Their Own Needs

Native communities are the least connected communities in America and comprise the exemplar of high-cost areas targeted by the Universal Service mandates of the Communications Act. Yet, out of 565 Federally recognized Tribes in the United States, only 8 have become their own regulatory providers.²² In the 16 years since the passage of the Telecommunications Act, only 3 Tribes have become regulatory providers. Yet in these 8 Tribal communities, life has changed drastically with 800 to 900 percent increases in connectivity—including broadband access-- as a result of Tribal self-help.

Why aren't more unserved Tribal communities embarking on this model path? NTTA attributes this lack of Tribal self-help to the lack of knowledge about regulatory provisioning; the high cost entailed of becoming an infrastructure provider; the lack of capital; the difficulty of being a regulatory provider; and the frequent unwillingness of price cap and incumbent carriers to sell service areas to Tribal governments.

Yet 8 Tribal nations have persevered in providing their own services, including widespread broadband deployment. The path for each Tribe has not been easy, but the results have been strong encouragement that other Tribal communities should consider the option of becoming their own providers. The

²² Standing Rock Telecommunications Incorporated was approved as a CETC in June, 2011, and is just beginning operations.

following is a description of the 8 Tribes and how they met the difficult challenge of becoming providers in order to provision their community's needs.

The **Cheyenne River Sioux Community** is located South Dakota. After observing the impact of lack of telecommunications on the Tribe, Tribal council moved to form their own telecommunications service to spur economic growth in the community. The **Cheyenne River Sioux Telecommunications, Incorporated** was formed in 1958, making the teleco the first and oldest Tribally-owned teleco in the United States. The Tribe has 3024 access lines, supports 640 lifeline customers, 583 broadband DSL customers, and 197 dial-up customers. The Tribe is about to embark on a Fiber to the Home project with loans from the Rural Utility Service.

Cheyenne River Sioux community is located in Ziebach County, the poorest county in the United States, and Dewey County, the fifth poorest county in the United States. Unemployment soars in the 90 percent range. Poverty is rampant, with a large percentage of the community living below poverty. Linkage through the tribal phone company is vital to the community and to their economy.

Faced with growing concerns over the lack of telecommunications service,

the *Tohono O'odham Tribe of Arizona* asked the Tohono O'odham Utility Authority to investigate the feasibility of acquiring the telephone system from Mountain Bell to provide service to its own community. In 1987, with funding from the Rural Electrification Authority and a Community Development Block Grant from HUD, the Tribe was able to purchase and develop its own telephone network.

Tohono O'odham is one of the communities reported in the 1990 census has having less than 10 percent telephone access in the 1980s. Today, the penetration exceeds 70 percent and is continuing to invest in new plant and network equipment, including extension of fiber throughout the community. The phone company is part of the consolidated Tohono O'odham Utility Authority delivering the full range of infrastructure service to the community and maintains 3155 access lines, with 115 Internet customers (a 3.6 percent take rate).

The Tribe has had over 10 percent unemployment with over 59 percent not in the labor force and over 40 percent of the families living below the poverty line. Currently 18 percent of residential customers are on Lifeline.

The **Fort Mojave Community** lays at the intersection of California, Nevada and Arizona with approximately 1000 tribal members. Fort Mojave was one of the communities with less than 10 percent access to voice dialtone in the

early 1980s. In 1988, the Fort Mojave Community authorized the formation of the **Fort Mojave Telecommunications, Incorporated** service to meet the needs of its community. The community partnered with a minority non-Tribal entity to launch their own service. At the time of the phone company startup, only portions of the community were developed tied to nontribal commercial interests. Today, the community, is linked across 3 states, with exchanges in Arizona, Nevada and California (over 1016 access lines) by fiber 45 miles of optic cable providing broadband access throughout 75 percent of the community. Penetration rate today is at 98 percent.

Fort Mojave community has higher unemployment and poverty rates than other communities within the United States.

The **Gila River Tribal community**, located in Arizona near Phoenix, in the mid-1980s began researching how to address the lack of telephone connectivity in their community. The Tribe was concerned over the lack of infrastructure resources to connect families, support business opportunity and adequate policy protection. In the 1990 census reflecting access in the 1980s, less than 1 resident in 10 had telephone service. A Gila River Telecommunications Incorporated employee told how the ILEC quoted her a \$30,000 fee to extend a line to her house. In 1989, the Tribe created the Gila River Telecommunications Incorporated to serve the community after purchasing certification from US

West.

Today, penetration in the Gila River community is over 84 percent—with 2,039 residential lines—with broadband take rate at 22 percent.

Yet, as a community, Gila River today still face severe economic challenges. Over 65 percent of families live below the federal poverty line and more than 50 percent of the population is unemployed—this does not reflect adults not even on unemployment rolls. 86 percent of Gila River residential customers (1,713 customers) are on lifeline and over 89 percent of the Tribe's elderly are on the phone company subsidy plan.

San Carlos Apache Tribe is located in remote eastern Arizona. The Tribe has an enrolled membership of 10,000 and occupies a reservation of 28,000 square miles. The 1990 census revealed that in the 1980s only 1 family in 10 had access to voice dialtone to call 911 for help. In 1995, the Tribe authorized the startup of the **San Carlos Apache Telephone Utilities Incorporated** to serve the community. Today, the San Carlos Telecommunications and Utilities Incorporated serves customers over 2531 access lines and supports over 1500 Lifeline customers in the community.

The San Carlos community has higher unemployment and poverty rates than other communities within the United States

The **Salt River Pima Maricopa community** was one of the better-connected Tribal communities in the U.S. However, the Tribal Council was unhappy with the quality of service to the community, with the fact 200-300 remote families could not attain voice dialtone, and with the exorbitant line extension charges being quoted to Tribal members. The Tribe in 1997 formed its own Tribal phone company, **Saddleback Communications** in partnership with a third party company. Saddleback applied for and received an experimental wireless license to bring fixed wireless phone service to the remote 300 families. In addition, Saddleback began deploying fiber throughout the community and was an early adopter of moving its traffic from tandem to soft switching.

The Salt River Pima Maricopa community has approximately 8,700 enrolled members living in the community.

In the 1980s, less than 10 percent of the **Mescalero Apache community** had voice dialtone. The Tribe under the leadership of Wendell Chino began plans to launch their telephone service in the mid-1990s. After prolonged negotiations with GTE, later to become Qwest, **Mescalero Apache Telecommunications, Incorporated** able to purchase the territory from Qwest and was approved as a Tribal ETC in 2001. The Mescalero community today has 98 percent connection to basic phone service and 98 percent of the community has access to broadband service.

Nearly 4000 enrolled members live on the Mescalero community in New Mexico. The community suffers from chronic underemployment and high poverty rates compared to other communities throughout America and New Mexico.

The **Hopi Nation** was another community with less than 10 percent telephone service in the 1990 census. In 2006 the Tribe arranged purchase of its service area, including the Hopi tribe and a small portion of the Navajo Nation. The FCC approved the Hopi Telecom's ETC status on January 31, 2007²³. Since then, Hopi Telecom has unified unlimited rates between 3 separate exchanges, built facilities bringing service to Hopi residents, and provided Lifeline support to over 72 percent of Hopi subscribers. Hopi Nation received an American Recovery and Reinvestment Act grant to extend 61 miles of fiber optic cable within the community to enhance the existing network and link isolated Hopi partitioned land areas without access to basic infrastructure.

The Hopi reservation comprises 5 zip codes covering over 1,433 square miles with 8,728 residents. According to 2004 census data, employment on Hopi land is 69 percent less than the national and Arizona state averages and the lowest quartile of 37 Arizona unincorporated areas. Government employment accounted for 70 percent of all jobs. Between 2000 and 2004, employment fell 25

²³ From the Commission's Hopi ETC designation Order, CC Docket 96-45, Jan. 31, 2007.

percent on the Hopi Reservation. Data from the recent economic downturn can only be worse.

Two additional Tribes belonging to NTTA are not regulatory telecoms, but are tribally owned and reflect similar challenging high-cost area service conditions. The Crow Creek Tribe—Native American Telecommunications, Incorporated is a Tribally-owned CLEC located in South Dakota, serving a community of 2,000 people. The community's median income is \$12,000 with 60 percent unemployment and 40 percent of the community lacks a high school degree. Pine Ridge Sioux—Native American Telecommunications, Incorporated a Tribally-owned CLEC is also located in South Dakota, with a population of 19,000 people and an unemployment rate of 85 percent. Median income in the community is \$20,500 and 35 percent of the community lacks a high school degree.

Impact of the FCC's proposed rules

In the FCC's field hearings taking a first look at Native access to telecommunications issues, held on March 23, 1999, Chairwoman Nora Helton testified before the FCC with the comments: "Technology is not the problem. It is the cost of providing service that is the problem. We can get service to these

customers if we want, but the challenge has been either recovery of cost, or for the larger providers it has sometimes been neglect. They have other areas that are more lucrative so they concentrate their efforts there.”²⁴ The issues on Tribal lands could not have been said more succinctly.

With the FCC’s proposed rules, we are at the same crossroads again, calculating how to drive technology (and parity of service) to a new place with the cross factor of cost, cost recovery and aggregated incentive to derive the broadband results the FCC seeks.

The FCC’s proposed rule change uses a regression analysis. For the HCL USF, there are 26 algorithm steps. For ICLS, there are entire Part 32, 36 and Part 69 processes to go through. Thus far, the FCC has taken the position that Tribal ILECS and all other rate of return carriers get the same treatment from the USF/ICC reform. NTTA, using an aggregate analysis conducted by Alexicon, reveals that the combined High Cost Loop support cap reduction (with the assumption of reduction from 90th quintile CapEx and OpEx caps) would result in the loss of \$1.38 million or 9.5 percent of their aggregate HCL support annually from the 8 Tribally-owned regulatory services. With the Interstate Common Line Support limit applied, the 8 Tribes would lose collectively \$1.3 million or 13.6 percent of their ICLS support annually. Combined, with FCC’s

²⁴ FCC public hearing at Wildhorse Pass on the Gila River Reservation, March 23, 1999, at page 40.

proposed rule changes for HCL and ICLS, the only 8 Tribal regulatory companies in America will lose \$2,687,799 million or 11.1 percent of their USF support funding.

Individually, for one Tribal regulatory company, the combined HCL and ICLS caps (at 90th quintile projection) would result in \$1.62 million loss of support comprising a 19 percent cut. For another Tribal telco the HCL cap represents a 16 percent loss of support funds. For a third company, over a period of 7 years, the proposed FCC rules for USF and ICC would result in the loss of \$1.114 million of its support revenues. A fourth Tribal teleco presented data to the FCC that demonstrated without current levels of support, the teleco will fail on all its loan commitments as well as failing to meet the requirements of its recently attained Broadband stimulus funding--to deliver fiber connectivity to unserved areas of the community. For a fifth Tribal teleco their HCL loss would result in loss of \$112,284 in support, comprising nearly 6 percent of current support.

These funding cuts may not pose a problem for the majority of commercial carriers. However, for tribal telcos, it may mean cutting back tribal staffing (junior indigenous employees in skills development positions), training programs, community support programs, and specialized customer services. While companies in less isolated markets are able to absorb support reduction

through non-regulatory services, Tribes in isolated markets may not have those non-regulatory options. In an unintended consequence, loss of regulated support revenues will curtail the ability of Tribal telecoms to diversify their service into non-regulatory ventures and initiatives.

But more importantly, the regulatory support loss represents a breach of reliance by the Tribes on federal obligations. The FCC requires Section 214 obligations of the provider but disavows Federal support responsibility part way into a material and substantial tribal commitment to support these public interest obligations. The public interest obligations of a Tribal regulatory provider, implicating a Tribal government obligation to the tribal consumer and subscribership, materially differ from the public interest obligations and interests of commercial vendors.

As the story of each of the regulatory tribes demonstrates, nearly every Tribe that became regulatory providers were previously unserved. In most of the communities, nearly 9 of 10 of each Tribal family did not have voice dialtone to call 911 for help when the Tribal government took the necessary and high-risk decision to embrace regulatory obligation to the Tribe. Each Tribal regulatory decision entailed a rigorous and debt-laden path to take on the telecommunications burdens of their community—for most Tribes the process of becoming a regulatory provider took 3-6 years. Tribal decisions to become a

regulatory provider was a double-obligation both to the federal regulatory authority through the Section 214 obligations and required the Tribal telecom entity to be answerable to Tribal government to deliver state-of-the-art telecommunications service to the community. The third commitment the Tribal telcos entered into was to attain capital and to sustain its regulatory services independently of Tribal support. Now, several years into substantial loans with investors and commitments to the Tribe, the Federal Communications Commissions has altered the rules for these truly high-cost service providers asking Tribal community providers to absorb in the aggregate at least 11 percent of their regulatory costs they relied on for support. The Tribal governments do not understand how if a Tribe has met all its federal regulatory obligations and public interest service obligations defined in Section 214 of the Communications Act that it would later have to absorb a cut to their regulatory support of up to 25 percent for some individual Tribes. This causes Tribes to consider implicating Tribal resources in meeting the shortfall of the regulatory companies. In the alternative, Tribal telcos may have to curtail regulatory services or tribal staffing that has generated tribal employment and labor skill gains made by the Tribe.

NTTA is also concerned that the positive impact of Tribes serving themselves (only 3 have gone down this path since 1996, with a fourth new

entrant about to lose it's new CETC funding)²⁵ will be lost if Tribes see that should they plan to become Broadband carriers of last resort they may lose crucial support mid-way into their mission of meeting the community's underservice needs and have to absorb additional regulatory burdens and costs out of their own finances. This would be a severe disincentive for Tribes to solve their broadband needs through providing regulatory service to its own community.

Unspoken behind this is the impact on financing created by the implicit or explicit regulatory loss built into regulatory CAF rules. Uncertainty for public and private investment may drastically harm the formation of future Tribal telecommunications services and dampen the solution for unserved Tribal areas. (In paragraph 1059, the commission acknowledges this reality:

“Reservation-based economies lack fundamental similarities to non-reservation economies and are among the most impoverished economies in the country. Tribal Nations also cannot collateralize trust land assets, and as a result, have more limited abilities to access credit and capital.”)

NTTA's Proposed Tribal Teleco Solutions

The road ahead for future self-help and self-sufficiency efforts for Tribes may be closed off if the Commission is unwilling to apply unique solutions to the

²⁵ Standing Rock Sioux Tribe was just granted its ETC status in June, 2011.

unique circumstances of Tribal communities.

Pursuant to the question posed by paragraph 1059 and 1088, NTTA proposes the FCC hold Tribal telecoms harmless from changes in the proposed USF/ICC order to permit Tribal telecoms to recover 100 percent of reasonable regulatory costs—looking to USAC audit reports as guidance on “reasonableness.”

In answer to paragraph 1059 inquiry whether a different rate of return is warranted for Tribal telecoms, NTTA answers in the affirmative based on the extensive reasons outlined above. NTTA supports all FCC’s efforts to reform the USF HCL and ICLS to remove efficiencies and direct essential support to the evolving Broadband and IP networks of the Future. NTTA’s proposal for a different rate of return for a small and unique group of providers operating under Sovereign Nations will be an exception that meets the public interest test of Section 214 and 254.

One proposal would be to simply permit Tribal telecoms to continue on their current path of cost recoveries under traditional hold-harmless or Native safety-net principles—within reasonable cost limits as defined by USAC and confirmed by USAC periodic audits.

The FCC may also apply a “high-risk” premium based on the criteria of: 1)

a Native Nation; 2) historic underservice—15 percent below Nationwide average at time of Teleco ETC status; 3) high-cost area—in the 90th quintile; 4) high unemployment rates (above nationwide average); 5) high percentage of population living below poverty (above nationwide average); 6) limited credit access: a public loan portfolio; 7) a commitment to deploying Broadband throughout the Tribal community. This High-Risk premium is based on traditional financing practice of combining equity and debt elements to apply to high-risk markets for public funding. NTTA proposes the High-Risk premium be set to 11.25% rate of return benchmark. This proposal meets the public interest criteria of Commission policy imperatives. (In the alternative, the FCC may call this a “Native Safety-Net” mechanism with the intention of keeping Tribes at current levels—2011—to continue Tribal government’s public interest service to the Tribal community.)

The FCC also asks in paragraph 1088 whether the Commission should apply a different percentile benchmark for permissible capital and operating costs. NTTA urges the FCC to apply a different benchmark for permissible capital and operating costs for Tribal Telecoms. Based on the unique nature of Tribal obligations to its own Tribe and the unique nature of required provisioning to anchor institutions with high cost to very low revenue return ratio, the FCC should consider the need for a unique benchmark for Tribal

telecos. NTTA suggests that the FCC should use the 100 percentile mark—at the 11.25 percent benchmark—for the disallowance of capital and operating costs for Tribal telecos because of Tribal telecos’ unique governmental public interest obligations. The FCC may apply extraordinary measures for public interest, see Section 253 admonition to remove barriers to entry, and assisting Tribal governments address formerly unserved Tribal lands in high-cost areas is consistent with public interest , convenience and necessity.²⁶

In weighing the public interest for applying unique or different rates of return or different benchmarks for Tribal Carriers, an additional assessment is the impact on the Universal Service Fund²⁷. Based on NTTA’s analysis of impact on the aggregate 8 Tribal telecos, the \$2.7 million reduction in support comprises a cut of 11 percent on their annual support. If the FCC were to balance harm to the 8 regulatory Tribes against the impact of granting a different rate of return, a different percentile for capping the capital and operating support funds, to the status quo ante 2012 support levels for the 8 Tribes, the entire amount of \$2.7 million set against the High Cost Fund, \$4.5 billion, will be .06 percent impact on

²⁶ Section 254(c)(1)(d).

²⁷ In the Sacred Wind Order, Docket 96-45, August, 2006, the Commission applied the impact assessment of its order: “Although there is a net increase of approximately \$5.4 million initially in universal service support as a result of this transaction, we find that the unique circumstances concerning the extremely low telephone penetration rate in this area justify the level of increase in universal service support. We also note that this increase is substantially less than one percent of the fund, and thus will not have an adverse effect on the universal service”, at paragraph 11.

the Fund. We note the Commission’s conclusion that the impact of granting study area waiver for Sacred Wind Telecommunications, Incorporated²⁸ for the \$5.4 million cost differential, was minimal—below 1 percent. This de minimus conclusion is twice the amount NTTA proposes to keep 8 Tribal Telecoms from being harmed.

Minimizing the harm to Tribal telecoms, honoring Trust obligations to Tribal governments, and supporting Tribal government’s public interest obligations to Native communities historically underserved serves the public interest obligations of the FCC. NTTA urges the FCC to not reduce the support of Universal Service support for Tribal telecoms until such time as each Tribe chooses to remove itself from this special “High-Risk” or Native “Safety-Net” support and voluntarily join the pool of Broadband ETCs under the support rules governing the Connect America Fund.

The FCC’s Proposed Waiver Rules Will Not Work for Tribal Telecoms

The FCC’s proposed waiver process for application of the USF and ICC reforms provides no relief for Tribes. The waiver is available to carriers that show good cause to exempt them from the Order, and is “necessary and in the public interest to ensure that consumers in the area continue to receive voice

²⁸ Sacred Wind Order, CC Docket 96-45, August 2006, see footnote 35,

service.”²⁹ The Commission requires voluminous documentation: “that the reduction in existing high-cost support would put consumers at risk of losing voice services, with no alternative terrestrial providers available to provide voice telephony service using the same or other technologies that provide the functionalities required for supported voice service.”³⁰

While the high standard required for waiver reflects the Commission’s intent to rid the Universal Service Fund of inefficiency and to drive transition to broadband service, the requirement for proof of lack of resources and alternative providers is an exercise in futility for Tribes. Tribes created their telecos to address these specific lack of resources and lack of alternatives. In fact, Tribal Nations are the exemplars of the failure of the universal service regulatory scheme. Public interest would excuse Tribal nations from going through the exercise twice to prove how critical universal service support is to uprooting underservice in their communities. The tragedy would be if Tribal telecos fail to provide sufficient documentation that the lack of resources will affect current and future service, when the challenge in tribal communities has been historic lack of both quantity and quality of service. Moreover, it would be the height of implausibility to suggest that alternative sources for voice service are available

²⁹ Id, paragraph 539.

³⁰ Id, paragraph 540.

once a Tribal government has made a commitment to meet these regulatory obligations itself. NTTA posits that the Commission’s waiver process cannot rationally be offered as a means for exempting Tribal providers from cuts to their universal service support—considering where they came from.

F. NTTA’s Concern for Impact of FCC Order on Tribal Communities

NTTA expresses concern that the FCC’s proposed glide-path of exempting price cap carriers from serving “unserved” areas will create uncertainty for regulatory service on Tribal lands and the proposed competitive auctions for service areas may result in more of the same under-resourcing and potential neglect for quality of service by new low-bid providers for Tribal lands.

In the future of Price Cap territories, the FCC has set aside \$300 million as incentive for Price Cap companies to expand broadband to “unserved” areas. Unfortunately, 80 percent of Indian country is in Price Cap territory and thus only changes affecting Price Cap carrier behavior or providing incentives will help Tribal communities—unless Tribes become their own regulatory providers. But in the FCC Order, Price Cap carriers may decline the option to deploy broadband service to unserved areas within the entire and trigger a competitive bidding process by ETCs willing to bid on service area support to provide broadband in the “unserved” areas. For unserved (broadband) Tribal

communities, this will create a wholesale uncertainty of who their providers are and what level and quality of broadband service they will receive. The result will be a new generation of providers on Tribal lands that have bid the lowest price to serve Tribal communities in the place of price cap carriers that failed to provide broadband at all.

The FCC expresses hope that the new “engagement” process may alleviate concerns over the quality of service Tribal communities may receive under the new Connect America Fund (CAF) rules. NTTA has reservations that this will be true, especially if the Tribe does not have the final approval for ETC service on Tribal lands. NTTA therefore urges the FCC to give Tribes the option to choose their ETC providers—difficult with the auctions strategy, or to give Tribes the first right of refusal to become their own regulatory providers.

G. NTTA’s Mobility Fund Concerns

The FCC asks a series of questions, 1165-1172, 1219 and 1235. However, the complex competitive bidding scheme for mobility funds may create more failure of expectations than help Tribal communities.

NTTA has strong concern over the FCC’s mobility rules is in the competitive bidding mechanism proposed to disperse the \$50 million phase I funding and the \$100 million annual funding to the targeted Tribal “unserved”

areas. In comments to the Commission, NTTA repeatedly urged the FCC to use *need* as a criteria to fund Tribal lands. But the FCC ignored that admonition and a proposed model using the existing E-rate system with its built-in priority of funding dispersal mechanism, commercial engagement, consumer control over quality of service, and an open and transparent procurement delivery system.

Instead, the Commission will be using a competitive bidding mechanism emphasizing cost to fund mobility projects in Tribal lands. This means an auction will be held among nationwide proposals with the lowest priced projects being awarded. The FCC has said that it's proposed "engagement" rules whereby ETC's winning the bids must engage in consultation within 5 days after winning the bid addresses this primary concern (of ensuring Tribal needs are being met) meets NTTA's concern that the over need of Indian country is not being met. NTTA is not convinced that this will be the outcome.

NTTA urges the Commission to prioritize funding, notwithstanding, or, in addition to auctions results, according need. A Native community's relative need (underservice) for broadband, for voice dialtone, for wireless access, in addition to poverty and unemployment levels on the Tribal land, and remoteness from large commercial markets or urban centers must be factored in to the mobility fund dispersal process. Proposals that will connect anchor institutions on Tribal lands should be given preference.

In answer to paragraph 1166, the FCC should require an engagement with the beneficiary/target Tribal community government—before the auctions begins and the prospective bidding ETC must attain approval from the Tribe to serve and install facilities in the community. ETC bidders should certify that they intend to meet all the rights of way legal and business requirements within the community in order to serve the community.

Paragraph 1166: Yes, a 25 percent bidding credit is fine.

However, paragraph 1167, NTTA feels a bidding credit will have very little impact in Tribal participation on implementing Mobility Fund projects unless Tribes are able to meet the criteria the funding recipients should be ETCs, and, intuitively such ETCs should have experience as commercial wireless services and have the wherewithal and experience to build-out and complete a mobility fund project within the time allotted for mobility fund build-out. Of course, failure to build out within the appropriate time should create an opportunity for a Tribe to come in and pay for a reserve price for the service area to serve its own community.

Paragraph 1167: yes the census population used for tribal reservation boundaries should be used.

The FCC also has expended enormous energy asking comment from Indian country over the bidding credits it proposes for Tribes to bid on their own

service area projects, but it appears the complex mechanism of bidding credits will have minimal impact on Tribes, Tribal choice or solving lack of access to real Broadband infrastructure (for instance, most Tribes and lay policy advocates are not aware that mobility wireless broadband for 3G and 4G handheld units are not equivalent to fixed wireless broadband networks that strengthen network capacity and backhaul functions.)

Paragraphs 1166 and 1167: Within the proposed rules, only Tribes that have their own ETCs (with requirement that applicants must have commercial experience providing mobility and broadband service, along with having access to spectrum) as suggestion that Tribes are able to participate or benefit from the targeted Tribal portion of the Mobility Funds. In time, in the later years of the Mobility Fund perhaps Tribes may be qualified to become participants. Primarily the projects awarded for Tribal areas will be carried out by non-Tribal mobility incumbent providers.

NTTA supports GCI's recommendations, paragraph 1169, to prioritize funding for communities without access to highways.

NTTA will look more closely at paragraphs 1170-72 to assess how these mobility fund competitive bidding mechanisms or dispersal can be better targeted to Tribal communities in need.

IV. Conclusion:

The FCC has an opportunity to solve the historic underservice to Native communities through a series of strategic and unique policies. By giving a sovereign nation the choice of its ETC provider, the Commission honors its special trust relationship to Tribal sovereign nations. By supporting the decision of Tribal governments to form their own regulatory service, the Commission promotes self-sufficiency of Tribes to solve their own telecommunications needs. By promoting ETC “engagement” with Tribes, the FCC promotes quality of service consultation that protects the public interest of Tribal consumers and alters the legacy of leaving service outcomes to chance on Tribal lands. And preserving the incumbent level of support and reducing the level of harm to Tribal telecos, preserves the public interest obligations of Tribal governments to its own previously unserved communities. These Commission policies follow the public interest requirements of the Communications Act.

Respectfully submitted,

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Chairman

National Tribal Telecommunications Association